

The Birth of the Dot Com Era

Introduction

Libraries are well-acquainted with the challenges of collecting traditional paper materials, and in the last decade, they have also become adept at digitizing paper materials, for easier accessibility and long-term preservation. But many of today's important documents have never been recorded in ink. The "paperless office" is certainly years away, but in the meantime, more and more information stored in electronic databases will never leave the computer's hard drive. The Library of Congress was charged in 2000 with exploring and preserving these "born-digital" materials, through the launch of the National Digital Information Infrastructure and Preservation Program (NDIIP).

The UMD project, led by Prof. David Kirsch, focuses on the preservation of digital business records from the dot-com era. Due to a confluence of forces, these records are at particular risk of immediate destruction. Dot-com ventures, by their very nature, kept more records in purely digital format than their traditional counterparts. And just as digital records can be deleted with relative ease, dot-com firms had a similarly unstable lifespan. Most, if not all, were too concerned about finding their next round of financing to give much thought to preserving their records for posterity.

Without making judgments about the economic and historic impact of the dot-com era, it is possible to say with relative certainty that future historians will be interested in understanding the full story, and that doing so without primary records from these flickering firms will be a painful undertaking. Small investments now will allow us to answer a host of thoughtful questions later. How did the decisions of early Internet companies affect the long-term development of the World Wide Web? Which e-commerce strategies were effective against traditional retailers, and which were not?

The passage of time will allow us to answer these questions, assuming the evidentiary record still remains. Due to the prolific nature of dot-com startups, their records are widely dispersed and many may already be lost. Fortunately, records also tend to concentrate in certain places, and we believe that the legal files of these startups may contain a wealth of historical information. Dot-com venture firms were heavy consumers of legal services—negotiating and drafting venture financing contracts, IPOs, patents and trademarks, mergers and acquisitions, and in many cases, bankruptcy. A startup's legal files have the potential to tell its story from birth to death.

Overview of Dot Com Era

In October 1994, Marc Andreessen and some of his colleagues who had developed Mosaic, the first graphical browser for the World Wide Web, released the beta of a commercially funded browser they called Netscape. Ten months later, Netscape

Communications Corporation went public at \$28 a share; that fall, it reached a peak of \$174—even though the company was making no real profits and its best-known product was essentially free. Even at year's end, when the share price settled around \$130, its market capitalization was more than five billion dollars—almost double the market value of the New York Times Corporation. In a front-page article in November 1995, the Times (perhaps worried about its own eclipse) announced the Web's arrival as a major “social, cultural and economic force” comparable to the “print and electronic media that have preceded it.”

In July 2001, Webvan, the online grocer, filed for bankruptcy. The company's stock, which had reached a high of more than \$30 following its successful Initial Public Offering (IPO) in November 1999, had dropped to 6 cents in the days before the final collapse. These events provide rough bookends for what came to be known as the Dot Com Era—an astonishing seven-year period of innovation, creativity, and entrepreneurship as well as waste, fraud, and dishonesty, and a period that will long be studied as one of the key moments in the history of American science and industry.

Precise counts are sensitive to arbitrary definitions, but regardless of the absolute numbers of firms formed, dollars of venture capital invested, or inches of newsprint devoted to the phenomenon, the economic and cultural moment defined by the dot com boom and bust will occupy the historical imagination for many years to come. As quickly as the boom came, the bust came even faster. Starting in early 2000 and accelerating thereafter, dot com failures began to accumulate, a process which continued through the end of 2002, by which time the rate of firm failures had slowed considerably.

The Need for Active Collecting

It is still too soon for historians to evaluate how the 1990s will stack up against other critical periods in the history of American industry, but it is not too soon to start collecting the archival materials that will be necessary for that eventual process of historical interpretation to proceed. Like classic industrial booms of decades and centuries past, the internet era combined the spread of a new general purpose technology with new mechanisms for broader public participation in national financial markets. Moreover, public and private policymakers have already drawn some “lessons” from the recent past, but we can be sure that these first words and deeds will not be the last reactions to recent events. Thus, for business and economic historians, scholars of American technology and culture, and policy analysts, getting the story right will be a challenging but necessary exercise.

That historians, economists, and public officials will long be interested in the history of the Dot Com Era is a certainty. What is less certain is whether they will have the sources for writing and studying that history. While our society invested literally billions of dollars in the creativity and waste (or “creative destruction” to use Joseph A. Schumpeter's term) that characterized the period, it has so far invested relatively little in

figuring out how to collect and preserve the digital objects that the era created and that constitute the primary sources for its documentation.

Of one thing we can be sure: faithful and representative archival traces of these events will certainly not emerge if we rely upon serendipity and passive processes of post-event archival accumulation. Just as many e-commerce firms operated without any brick-and-mortar presence, technology startups kept many of their records and communications in purely digital form, without paper output. And these digital records are more vulnerable to decay than paper products. Hard disks unearthed decades from now may be obsolete and unreadable, if their magnetic information even remains. More likely, they will have been deleted much earlier, either by routine, accident, or intention. Only active and timely collection will produce the necessary range of archival materials that future scholars will need and expect.

Project Goals

1. To establish guidelines and procedures for preservation of publicly accessible digital archival materials documenting private sector activities during the Dot Com Era.
2. To identify the criteria for establishing the historical value of such materials.
3. To develop the technical and institutional context within which these materials can be legally acquired and preserved.
4. To assemble a significant collection of these digital materials, along with a select collection of related physical ephemera.
5. To establish the Internet Archive as a Trusted Digital Repository capable of accessioning materials that will be governed by newly developed mechanisms for long-term access management produced under [3] above.
6. The resulting combination of technical and institutional mechanisms will provide the basis for the development of persistent networks that will be able to absorb additional related materials that may become available in the future.

Thematic Collections of Digital Archival Material

To facilitate the collection of these at-risk materials, this project envisions a series of “case studies” that will produce sample collections of lasting historical value, while also establishing generic mechanisms and institutions for collection, selection and preservation of these types of materials. Taken together, we are assembling collections of national importance that will also build protocols and approaches that will be applicable to other digital archiving projects.

The proposal envisions work on three thematic collections:

1. *Vision: Business Plan Archive.* This initiative—launched in mid-2002 with financial support from the Alfred P. Sloan Foundation, the Robert H. Smith

School of Business at the University of Maryland, College Park, and the Center for History and New Media at George Mason University—aims to collect the broadest possible sample of business planning materials produced in the course of the Dot Com boom and bust.

2. *People: Voices from the Boom and Bust.* This initiative, envisioned and funded from the same sources as the Business Plan Archive, focuses on collecting detailed personal narratives from participants in all realms of the Dot Com Era, including entrepreneurs, employees, customers, suppliers and investors.
3. *Law: The Digital Records of Law Firms.* This initiative intends to collect and preserve the digital legal records of Dot Com Era technology firms, especially those that have now failed. While many types of digital business records are increasingly at risk of being destroyed, establishing a protocol to conserve business records produced in the context of an attorney-client relationship may set a new precedent balancing public and private interests in the production of historical records.

Highlights

1. Topic of evident importance to American history in late twentieth century with proven communities of interest numbering in the tens of thousands.
2. Extensive public-private sector cooperation, including active, partner-level participation, as well as informal contributions from thousands of former stakeholders in Dot Com Era ventures and activities.
3. Certification of the Internet Archive as a Trusted Digital Repository under emerging guidelines established by RLG / NARA Task Force of Digital Repository Certification.
4. Established access to numerous and varied types of mixed media collections, including many non-traditional sources ranging from personal email directories and found digital video to extensive legal records heretofore publicly unavailable.
5. Interlocking set of technical and institutional protocols for securing future access, with possible precedent-setting opportunity to secure extensive digital collection of legal documents for long-term preservation.

Phase I: Exploratory Research Plans

Our project understands the confidentiality of legal files, as well as the other rights that may be involved, such as copyright and privacy. We will spend academic year 2004-2005 exploring these access issues with respected law school faculty and legal practitioners. This advisory council includes nationally-known legal ethics expert Geoffrey Hazard, and practitioner Thomas Spahn of McGuire Woods LLP. Other experts have prior experience working with failed dot-coms, such as Sherwood Partners founder Marty

Pichinson. The Library of Congress will provide expertise on issues ranging from archival practices to copyright.

Under current provisions of legal ethics rules, the client or the client's attorney would need to review each and every page prior to anyone else being granted access, archivists included. Yet, with many clients no longer extant, enormous pieces of the collection are in legal limbo, with no one having clear legal standing to determine the appropriate disposition of the materials. We propose to address these challenges in partnership with the American Bar Association, American Bar Foundation, the Business History Conference, the American Society for Legal History, and the Hagley Museum. We will also draw upon the considerable intellectual resources of the Library of Congress in this phase of the project. Initial efforts will entail resource identification, issue spotting, and organizing workshops to develop a protocol document that the project and the Library can both use as a guide to handling these materials.

Our examination of the rights surrounding these legal records will be thorough and neutral. With the advice of our experts, we intend to develop a protocol for saving these at-risk records that respects the rights of every stakeholder. We understand that such a protocol may impose restrictions on confidential information, and that these records may remain sealed for many years. However, we would prefer to see the records privately and securely stored, rather than wiped from a hard disk, irretrievable to history. And the digital nature of these records allows more flexibility than traditional paper documents. For instance, cutting-edge developments in data retrieval and search technology may allow us to extract non-confidential information from databases without human intervention, thus preserving confidentiality.

The protocol document will be drafted by a legal team assembled by the project expressly for this purpose and will benefit from the efforts of an advisory council composed of leading scholars and practitioners who have indicated their enthusiasm for participating. This process will also be informed by technical guidance from electronic litigation consultants Gallivan, Gallivan & O'Melia, in consultation with other relevant technical experts (for instance, at the Center for History and New Media at George Mason University, the Internet Archive and elsewhere in the private sector). Acceptance of this document by the Library will represent a watershed event in our pursuit of the archival traces of the Dot Com Era and set an important precedent for archivists in a range of different fields, as well as for legal historians, sociologists of law, and practicing lawyers. Delivery of this document will be the principal output of Phase I of the project.

LEGAL RESEARCH: ADVISORY COUNCIL

The advisory council will provide input on the following subject areas with regard to accessioning lawyers' papers.

Intellectual Property

The collection will undoubtedly contain valuable intellectual property, such as business plans or website designs. The collection will also contain closely guarded trade secrets, likely of a technical nature. Although these protected documents will be found in a particular client's files, the range of potential rights holders is very broad. The intellectual property rights may belong to the client, or to one of its founders, independent contractors or business partners. If the client is no longer extant, the rights may have been transferred in liquidation, or no provision may have been made for their disposal.

The advisory council must consider the role that any repository may have in infringing these intellectual property rights. This role may vary depending on decisions made by the repository; they may seal, close, or limit access to the collection, or the collection may be open, perhaps even actively published on the Internet. The advisory council will determine the appropriateness of these decisions.

The council will also determine whether the repository may take advantage of fair use protections. This determination will need to take into account the fact that while two of the four factors in determining fair use (the purpose of the use, and the amount of the work used) will be relatively constant, the other two factors (the nature of the documents, and the effects on market value) may vary significantly. The council may also explore the potential for broader protections, such as legislative remedies.

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Legal Ethics and Confidentiality

The collection contains e-mail and letters which will fall under attorney-client privilege. Additionally, many more materials will constitute attorney work-product, and perhaps a vast majority will fall under the definition of confidential. There will be some content not subject to these restrictions, however, such as court filings, SEC filings or other information that is generally known.

The advisory council must investigate the application of the ABA's Model Rules, state-specific rules and statutes, and the ALI's Restatement of the Law Governing Lawyers. The council may look to the past for precedent, such as the acquisition of Joseph Rauh, Jr.'s papers by the Library of Congress, or the acquisition of Kenneth Simpson's papers at Yale. The potential solutions offered by these precedents include shifting the burden of approval to researchers who use the collection, or alternatively sealing the confidential materials for a period of years. The council will also be forced move beyond the past precedents by the unique characteristics of the collection—namely, its magnitude and digital nature. Sophisticated data storage and retrieval technology may provide a new context for examining issues of confidentiality.

The council will investigate these and other solutions, and determine which, if any, are meritorious. If the recommendation requires making additional determinations about the material—such as, which materials cause financial or reputational harm to the client—then the council will provide a standard for these determinations.

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Privacy

The collection contains a plentiful amount of both personal and corporate private data. Personal data may include salary information, employee disciplinary records, or embarrassing anecdotal information. Corporate data may include information obtained from other companies under a confidentiality agreement, or information that was obtained during discovery under a protective court order. The project team may have the capability of automatically redacting individual names appearing in private contexts, with an unknown degree of accuracy.

The advisory council must determine what type of material should be deemed private, taking into account the potential for abuse if the collection were open to the public. The council must also recognize the potential legal obligations the repository may have for maintaining certain types of privacy, whether required by statute or court protective order.

Bankruptcy

Many of the clients are no longer extant. Some filed bankruptcy or an assignment for benefit of creditors, while others were liquidated more informally. We are initially interested in these non-extant clients, as the risk of financial harm by accessioning their records is likely less.

The advisory council will analyze the impact that bankruptcy (or other alternative liquidation) has on the areas of intellectual property, confidentiality and privacy. Weintraub holds that the trustee in corporate bankruptcy may waive the attorney-client privilege, but does this extend to the ethical duty of confidentiality? The council may also explore whether corporations seeking bankruptcy incur any social obligations, and whether these obligations may be satisfied by assisting with historical research into the firm's past. Similarly, the council may explore whether a firm's historical records have monetary value, which could allow them to be sold to maximize the value of the estate.

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Business Historians and Archivists

The project team imagines that business historians will find this collection invaluable, and their presence will allow the council to perform a cost/benefit analysis of accessioning certain types of records. This will allow the council to focus on the records of the most value to historians.

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TECHNICAL RESEARCH: GALLIVAN, GALLIVAN & O'MELIA

With Gallivan's assistance, we will conduct an initial survey of the data with three distinct elements. First, we will assemble a technical profile of the data; second, we will conduct several aggregate statistical inquiries in support of current applied social science research; and third, we will obtain client authorization for an in-depth "test case" of a single client's collected files.

Technical Profile

The technical profile is limited in scope to the metadata, and does not propose to investigate the substance of the data itself. Neither the collection process nor the output will reveal the identity of any given client. We propose to gather data on the following variables:

1. Time span contained in the data, and in each particular database
2. Names of all variables contained in each database
3. Distribution of various file formats (Word, Excel, etc.) over each particular database
4. Range, median and mean number and size of entries per firm
5. The extent to which the Client ID accurately and completely identifies all relevant data related to that client
6. Number of total users in e-mail database
7. Number of total messages in e-mail database

Applied Social Science Research

The objective of this element is to assess the current value of the data to academic researchers. Although it may be some years before the detailed contents of the archive can be shared, the data may still be put to good use in the meantime. The output will be sufficient to allow for statistical analysis in support of the current research, but access to will be conducted in such a way as to preserve privilege and confidentiality. The study's output will not contain any identifiable information.

This preliminary research will also provide an opportunity to explore the potential of GGO's search capabilities. In an ideal situation, we envision being able to retrieve the research variables we are interested in automatically, without human intervention. The list of variables we propose to extract is extensive, and we understand that some variables will lend themselves to this process far more easily than others. GGO's input will be instrumental in refining the variable list to match the technology's capabilities.

We will therefore evaluate our ability to study the following themes of immediate relevance to social science.

1. *Term Sheets & Contracts*. What patterns connect contractual terms with success and failure of ventures and projects? What are the differences between venture capital firms and angel investors? By looking at the population of term sheets contained in the collections and coding terms, dates, and other attributes of the parties, we can answer a range of potentially interesting and valuable questions:

1. What are the implications of the length of time between term sheet and contract signing for firm outcome? What are the implications of the number of draft revisions?
 2. Are angel investors less severe in dealing with entrepreneurs than VCs? Are the angel contracts more or less complex than VC contracts?
 3. Do more restrictive terms for the entrepreneur lead to better or worse performance?
 4. Do angel term sheets proceed to contract differently than VC negotiations?
 5. How does participation of an angel investor affect firm-level outcome?
 6. What are the implications of signed vs. unsigned term sheets for the contract? For the firm outcome?
 7. Can term sheets be modeled and analyzed using real options? Does this require a cancellation fee?
2. *Ownership structure.* How does ownership structure affect performance? Very little data exist on startup, pre-IPO, and failed ventures. By looking at different distributions of ownership across a population of new ventures, we will learn about the importance of incentives and motivation as determinants of firm outcome:
1. Do entrepreneurial incentives, measured as share of compensation from salary versus stock ownership, affect outcome?
 2. Does the relative fraction of employees owning shares affect firm performance?
 3. Do firms with broader distributions of ownership outperform firms where ownership is more concentrated among founders and senior managers?
3. *Future Research.* After examining the usefulness of this data, and the ease with which it can be extracted, there are many other potential research avenues. Some sample questions are:
1. How do repeated interactions between attorneys (representing different clients) affect contract outcome?
 2. How do repeated interactions between clients affect contract outcome?
 3. How do firms categorize their competition, as seen in the companies listed in their non-compete agreements? How does this differ from their public self-categorization?
 4. What is the relationship between use of legal services and firm outcome? Do certain types of legal services have a larger impact on the outcome? Are certain times in a firm's lifecycle more appropriate to consuming legal services?

5. Do negotiations in which clients waive conflict of interest to allow the firm to negotiate with itself result in significantly different outcomes?

Initial Reference Case

Investigating the substance of the data is critical to future archival interests, however this exploration is hampered by potential restrictions such as attorney-client privilege, confidentiality, bankruptcy, intellectual property rights and privacy. We therefore propose locating, through other contacts, a test client willing to provide a blanket waiver of these rights for the purposes of our initial research. This waiver will be narrowly limited in scope to files in the GGO repository containing its Client ID, and narrowly limited in use to anonymous research. However, the waiver will broadly encompass the spectrum of rights that the client could assert concerning the data. Under the protection of this waiver, we will investigate several questions central to further archival work.

1. To what extent can we accurately identify privileged, confidential, and copyrighted records using computerized methods?
2. To what extent can we accurately identify and redact private information using computerized methods?
3. How complete are the digital records with respect to the paper archives?
4. Can we construct a model of rights-holders that could systematically identify various individuals and firms with the right to access the data?

The answers to these questions will better position us to explore the possibility of accessioning the broader database without violating clients' rights. Our opportunity will be optimized by selecting a client that meets certain specific requirements.

1. It must be of sufficient size to generate useful statistics.
2. Ownership of the relevant rights (privilege, etc.) must be clearly established.
3. The owner must support the project's objectives.
4. We should have access to the complete original paper documents.
5. The lifespan of the company should fall within the timespan of the data.
6. There should be no residual commercial value to any of the client's business activities.

There are several potential channels through which to acquire such a company, such as through partners and associates. We will also extend invitations within our informal legal network to assist in drafting the waiver.

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	September	October	November	December
Library	Confirm Contract Signing	Network Kickoff	1st Quarterly Report	
Advisory Council	Select Chairs	ASLH Meeting in Austin	Finalize Council Membership Finalize Workshop Dates Extend All Invitations	
Data Exploration	Submit Data Exploration Plan to GGO	Travel to SF w/ GGO	Analyze Output/Suggest Improvement	
Legal Research		Confidentiality/Privilege Draft Intellectual Property Draft	Privacy Draft	Bankruptcy D Circulate Dra
Protocol Drafting			Identify Potential Attorneys	

January	February	March	April	May
	2nd Quarterly Report	NDIIP Semi-Annual Mtg	Submit Protocol Document	3rd Quarterly
Agenda/Materials for 1st Wkshp. 1st Protocol Workshop		Agenda/Materials for 2nd Wkshp. 2nd Protocol Workshop		
	Submit Draft Protocol for Debate		Confirm Technical Feasibility	
All papers revised w/ AC input				

Enlist Atty/Arrange Logistics of Pay

Receive Final Protocol

Submit Final Position Papers

Submit Request for Revisions

Receive Draft Protocol